Supreme Court, U. S.
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80-430

No.

IN THE

Supreme Court of the United States

October Term 1980

DANTE ANGELO GRASSI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court's conduct of a mini-hearing, at the outset of a complex conspiracy trial, to determine the admissibility of alleged coconspirators' statements, complied with the requirements of Federal Rules of Evidence 104(a) and 801(d)(2)(E), when the mini-hearing was deliberately hasty and superficial and the trial court incorrectly applied the prima facie evidence standard as the standard of proof.

II. Whether the district court's denial of a severance in a lengthy jury trial on two ostensibly related conspiracy charges and related substantive counts, when the vast bulk of the evidence was addressed to one of the conspiracies and wholly failed to connect petitioner to those events, resulted in transference of guilt prejudicing trial of petitioner on the second conspiracy count.

III. Whether the Court of Appeals erred in upholding petitioner's conviction for one count of conspiracy after that court concluded there was *no evidence* to support petitioner's conviction on a related conspiracy charge, where the evidence in a lengthy jury trial had been addressed overwhelmingly to the conspiracy charge in which petitioner had not been incriminated.

IV. (a) Whether the Court of Appeals erred in holding that a person can unlawfully conspire by entering into an agreement with an undercover federal agent.

(b) Whether an agreement between a person and undercover agents that was subject to a condition that the undercover agents were not police is a conspiracy.

PARTIES TO THE PROCEEDING

The Court of Appeals opinion in this case below dealt together with the separate appeals of petitioner and Jack Louis Gail, a codefendant in the district court proceeding. This petition for writ of certiorari is filed on behalf of petitioner, Dante Angelo Grassi, alone.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit below is reported at 616 F. 2d 1295. A copy of that opinion is attached as Appendix A.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was dated and entered on May 14, 1980. A copy of the judgment is attached as Appendix B. A timely petition for rehearing *en banc* was denied by an order dated and entered on July 31, 1980. A copy of the order is attached as Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

FEDERAL RULES INVOLVED

FEDERAL RULES OF EVIDENCE (Public Law 93-595, 88 Stat. 1926, 28 U. S. C. App.)

ARTICLE I. GENERAL PROVISIONS

* * *

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to,

the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

* * *

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

* * *

(4) Statements which are not hearsay. A statement is not hearsay if— . . .

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

This case presents a set of related questions under the new federal procedure for trying defendants accused of conspiracy offenses. When the Federal Rules of Evidence became effective on July 1, 1975, they significantly altered the roles of judge and jury in conspiracy prosecutions. This case reflects five years of litigation in the lower federal courts seeking to interpret the new rules and to resolve the ambiguities in their provisions. The central question here is whether the district judge properly fulfilled the responsibilities that the Federal Rules of Evidence place on trial courts. The answer to that question turns upon this Court's view of the definition of those responsibilities.

Petitioner was indicted on two counts of conspiracy. Count I charged that petitioner and seven others had conspired in violation of 18 U. S. C. § 371 to distribute controlled substances and to possess and transfer firearms unlawfully. Count II charged petitioner and one other defendant with conspiracy to import controlled substances. The indictment also contained nineteen substantive offenses, but petitioner was not charged in any of these substantive counts. The indictment was returned in the United States District Court for the Southern District of Florida, and the case was assigned to Hon. James Lawrence King, D. J.

Since there were twenty-one counts, including two conspiracy charges, and there were eight defendants, it was apparent that there would be difficulties in regard to admission of alleged coconspirators' statements as well as issues of joinder. Defense motions in advance of trial, including motions for severance, were denied. The case came on for trial by jury on May 21, 1979.[1]

1. One of the eight defendants elected to be tried by the court and was acquitted.

1. Admission of Coconspirators' Statements

The admissibility of alleged coconspirators' statements arose almost immediately as trial began. After the petit jury had been sworn and the first witness had begun his testimony, defense counsel objected to questions that would have elicted answers recounting out-of-court statements of individual defendants. The district court elected to hold a mini-hearing outside the presence of the jury to determine whether the necessary predicate existed for introduction of these hearsay statements. The trial judge's decision was in accord with a recent opinion of the United States Court of Appeals for the Fifth Circuit, which three months earlier had totally recast the procedure to be followed within that Circuit on such matters. *United States v. James,* 590 F. 2d 575 (5th Cir.) (en banc), cert. denied, 442 U. S. 917 (1979). Within the Fifth Circuit, the mini-hearing is called a James hearing. Other Circuits have different names.

The quality of the James hearing is crucial to the questions presented in this petition. From the beginning of the hearing, the trial judge evidenced great impatience. He actually directed the prosecutor not to be thorough in presentation of the government's case:

> "I ask the government to proceed to lay the threshold basis for, if the government can, by showing that the necessary evidence is available which would authorize the government to go forward to present its evidence to the jury, concerning the conspiracy and membership therein by the individual named defendants. . . . I ask that you do this briefly, skimming over the high spots, introducing only a prima facie showing, basic showing of conspiracy and involvement therein. You may lead the witness and I will

attempt to move along as fast as possible." (Tr. 16-17).[2]

The Government's entire presentation in the mini-hearing consisted of the testimony of a *single* witness, Ralph Altman, Special Agent, Bureau of Alcohol, Tobacco and Firearms. The prosecutor began to elicit from Altman sketchy accounts of the earliest meetings the government agents had had with one or several of the eight defendants. (Tr. 17-24). Very soon, the district judge interrupted because, in his view, the prosecutor's pace was too slow:

> "Let me interrupt you.
>
> "I think if we can proceed on now—I know you are going to be skimming over it, but I am not interested in each of the meetings that have been held.
>
> "You talked about the defendant Grassi, and you talked about defendant Ammirato. You testified concerning the defendant Watson, Carl Watson, and the defendant Charles Watson.
>
> "When is your first meeting with, if you had one, either Jack Louis Gail, Kenneth Lytle, Alfred Beuf, or Mr. Russell Sturgall?" (Tr. 25).

The prosecutor tried to speed up his already rapid pace. He asked the witness to "talk about" another defendant by describing briefly meetings the agents had had with him. (Tr. 26-27). Again the district judge intervened to hurry the prosecutor along:

"Let us move to a different defendant." (Tr. 27). After a few more minutes of disjointed testimony, with the prosecutor hastily seeking some testimony that named

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2. References preceded by "Tr." refer to the pages of the transcript of proceedings at the trial.

each of the remaining defendants once (Tr. 27-44), the district judge signaled that he had heard enough:

> "Unless there is something earth-shattering that you feel compelled to produce further, I would think that we should hear from the defendants as to whether or not they have any evidence." (Tr. 44).

The prosecutor pressed on with a few more questions, whereupon he rested with the declaration that he had made "our prima facie showing under James." (Tr. 46).

The evidence thus produced was sketchy and disjointed. The witness described work that he and two associates had done under cover, pretending to be buyers of narcotics and firearms. This evidence had nothing to do with petitioner. Altman testified that there were six completed purchases of narcotics and weapons from some of petitioner's codefendants. (Tr. 17-21, 26-38). He also recounted conversations with these and other defendants about other possible transactions that never took place. (Tr. 38-41, 43-44). The agent also testified that additional contraband was seized when two of the defendants were arrested. (Tr. 44-46, 63-64). As mentioned, none of this testimony, which constituted the bulk of the very brief mini-hearing, linked petitioner to any of these events.

The small amount of evidence that did relate to petitioner in the James hearing described his part in two conversations with the agents. In addition to the agents' undercover roles as buyers, they also pretended to have a large quantity of marijuana to sell. At the first meeting, one government agent met alone with petitioner and proposed to sell the marijuana. Petitioner replied that he and his boss would probably be interested, but that the sellers would have to get someone to vouch for them. (Tr. 23-24). At the second meeting, over a month later, three agents and three defendants were present. Altman testified that there was "general discussion" of the

marijuana importation. (Tr. 34). The discussion was inconclusive because of the absence of a "vouch" for the agents. (Tr. 35).

After the government rested, there was extensive discussion between counsel and the court. (Tr. 46-62). A few more questions were put to the witness. (Tr. 62-64). Even though the court actively discouraged cross-examination (Tr. 46-50), counsel for defendants other than petitioner cross-examined briefly. (Tr. 64-73). The district judge then expressly declared his determination, foreshadowed much earlier, that the requirements of the *James* decision had been met. The court thus ruled that the government would be allowed to introduce before the jury the statements of all alleged coconspirators against all defendants on both conspiracy charges.

In arriving at this determination, the district court repeatedly articulated the standard of proof required in terms of prima facie evidence. At the outset, the court advised the prosecutor that he need make "only a prima facie showing." (Tr. 17). This familar standard governs the judicial task of preliminarily assessing evidence when the ultimate fact-finding responsibility rests with a jury. The Fifth Circuit in *James* had held that the new Federal Rules of Evidence made admission of evidence a task for the judge alone. Ignoring the Rules and the Circuit Court's decision, the district court declared: "Absent some extraordinary circumstances, I intend to handle James the same way as I have for nine years; . . ." (Tr. 7). Later, in colloquy, the court used the different standards of prima facie proof and substantial evidence as if, in his mind, they were interchangeable. (Tr. 51).

While the district judge saw no reason to change his personal view of the judge's role in admission of alleged coconspirator's statements, he did recognize that the jury's function had been changed. Specifically, he ruled that

when such testimony was introduced, he would not give a cautionary instruction to the jury, known in the Fifth Circuit as an "Apollo charge." [3] (Tr. 80, 82).

The total time devoted to the James mini-hearing was about ninety minutes. (Tr. 83).

2. Prejudicial Joinder

From the time of the indictment, petitioner sought to prevent the grave injury of being put on trial with seven defendants charged with nineteen counts that had no connection with petitioner. Petitioner also maintained that there was no evidence incriminating him on the two conspiracy counts in which he had been named as a defendant. Petitioner contended that a blunderbuss trial on all twenty-one counts would result in prejudicial spillover of inferences of guilt from the numerous events and persons involved and from the web of hearsay spun around the two conspiracy counts. As will be seen, petitioner ultimately prevailed on the major part of that contention in the Court of Appeals. However, that court's remedy was too little and too late to overcome all of the harm that had occurred in the district court.

Defense motions in advance of trial, including motions for severance and a motion to dismiss Count I, were denied by the district court. (Record Excerpts 16a-24a).[4] By the fourth day of the trial, five of petitioner's codefendants had entered pleas of guilty. (Record Excerpts 11a; Tr. 87-100, 340-44, 417). The prosecution

3. Under United States v. Apollo, 476 F. 2d 156 (5th Cir. 1973), when extrajudicial statements of alleged coconspirators are proffered in evidence in a jury trial, a cautionary instruction must be given on the limited uses of hearsay testimony. (476 F. 2d at 163).

4. References to "Record Excerpts" refer to portions of the record printed and filed in the Court of Appeals below.

nonetheless pressed forward with its full evidence against these defendants in the trial of the three others.

Trial on the merits lasted two weeks. The final record was in excess of 1400 transcript pages. It is unnecessary, for this petition, to recount that evidence in detail since virtually all of it was directed to the Count I conspiracy charge and the related substantive offenses. The prosecution persistently extracted from a series of undercover agents detailed accounts of numerous transactions and conversations, that had no relevance to petitioner.

The picture that emerged showed government agents, flourishing large sums of money, as they bought drugs and weapons from the guilty-pleading and other defendants. Extensive electronic recordings of the agents' conversations with these defendants were played for the jury, with additional testimonial commentary by the agents. A small mountain of pills, powders, and artillery was identified, introduced into evidence and piled up before the jury. To summarize only this physical evidence:

1. Amphetamines-phentermine hydrochloride

   2 capsules, given to Special Agent Ralph Altman by Carl Watson and Frank Ammirato on May 5, 1978. (Gov't Exhibit 1, Tr. 1288).

   1,028 capsules, sold to Altman by Carl Watson on May 9, 1978. (Gov't Exhibit 2, Tr. 1288).

   4,964 capsules, sold to Altman and Special Agent Michael O'Connor by Carl Watson on May 12, 1978. (Gov't Exhibit 3, Tr. 1288).

2. Automatic rifles

   1 AR-15 rifle, sold to Altman by Carl Watson on May 30, 1978. (Gov't Exhibit 4, Tr. 324).

   1 AR-15 rifle, sold to Altman by Carl Watson on June 12-13, 1978. (Gov't Exhibit 5, Tr. 324).

3. PCP—phencyclidine in lactose

   8 ounces, sold to Altman, O'Connor and Special Employee Gary Peacock by Frank Ammirato on June 28, 1978. (Gov't Exhibit 6, Tr. 1288).

   24 ounces, sold to Altman, O'Connor and Peacock by Frank Ammirato on July 14, 1978. (Gov't Exhibit 8, Tr. 1288).

4. Pistols and silencers from Chicago

   1 Colt Woodsman .22 caliber pistol fitted with a silencer, sold to Altman by Jack Gail and Frank Ammirato on July 7, 1978. (Gov't Exhibit 7, Tr. 324).

   2 Ruger .22 caliber pistols fitted with silencers, sold to Altman by Jack Gail on July 29, 1978. (Gov't Exhibits 9 and 9A, Tr. 324).

5. Pistols with silencers from Florida

   1 Ruger .22 caliber pistol fitted with a silencer, sold to Peacock by Carl Watson and Ken Lytle on August 14, 1978. (Gov't Exhibit 12, Tr. 1216).

   50 silencers, 1 Ruger pistol fitted with a silencer, and 1 Ruger pistol with a threaded portion for attachment of a silencer, seized by Special Agent Snyder and others upon the arrest of Carl Watson and Ken Lytle on November 29, 1978. (Gov't Exhibits 15, 15A and 15B, Tr. 668-69).

6. Carbines

   2 carbines .30 caliber, sold to Altman and Peacock by Sturgall Russell on August 10, 1978. (Gov't Exhibit 10, Tr. 324).

Petitioner here, Dante Angelo Grassi, was not shown to have had *anything* to do with these consummated trans-

actions. Nor was there *any evidence* connecting him with the conversations that the undercover agents had had with other defendants about additional purchases by the agents. The many hours of electronic recordings did not ever contain petitioner's voice.

In addition, the government agents were permitted to testify indiscriminately to statements said to have been made by the other defendants, referring to petitioner, but not made in his presence. These extrajudicial statements were admitted freely as a result of the district court's erroneous ruling in the mini-hearing on the first day of the trial.

Despite the total absence of evidence against petitioner in these extensive government purchases of drugs and guns, which were the substance of twenty of the twenty-one counts including Count I, the district court allowed the Count I conspiracy charge against petitioner to go to the jury. Despite the total absence of evidence against petitioner on Count I, the jury returned a verdict of guilty. Not until the Court of Appeals heard the case on appeal was the massive injustice recognized. The Court of Appeals held:

> ". . . there was *no evidence* that Grassi was a participant in the count 1 conspiracy discussions, or that he indicated, *expressly or impliedly,* his involvement or personal interest in the count 1 conspiracy." (Appendix A, *infra,* p. A8) (emphasis added).

The Court of Appeals held, however, that there was evidence to support petitioner's conviction of the Count II conspiracy. The Count II charge involved the undercover agents pretending to be *sellers* of a fictitious shipment of marijuana. The meager evidence that had relevance to Count II came into the record interspersed with the massive evidence on the agents' activities as *buyers.*

The entire case against petitioner on Count II, excluding inadmissible hearsay, rests upon evidence of two conversations. The first, on May 12, 1978, between petitioner and Special Employee Peacock lasted some 10 to 15 minutes. (Tr. 762-63). Peacock said that he had a shipment of marijuana coming in from abroad and that he wished to sell some of it. Petitioner expressed possible interest, but told Peacock that, before any business could be done, Peacock would have to be checked out as to who he really was. Peacock gave petitioner names of two people who, Peacock said, would vouch for him.[5] (Tr. 762-63).

The second conversation took place at a meeting the following July 27. The meeting was set up at the request of the undercover agents, who came to Ammirato's home. Ammirato, petitioner, and a third defendant were present. A great deal of the conversation was taken up with discussions among Ammirato and the government agents about the agents' purchases of drugs and weapons. Petitioner took no part. On the subject of the fictitious marijuana shipment the agents were purportedly selling, the agents testified that petitioner expressed interest. Special Agent Altman said that the possible buyers were petitioner and "his boss," but Altman did not know who the latter was. Special Agent O'Conner said that appellant and "his people" were interested, but again there is no indication of what persons were referred to. (Tr. 198-200, 211-26, 832-44, 1276-84).

Despite the absence of sufficient evidence of any unlawful agreement, the prosecution was allowed to introduce highly inflammatory hearsay statements as the statements of coconspirators. Thus, Special Agent Altman,

5. Four days later, Peacock spoke to petitioner and Frank Ammirato by telephone. This conversation was only a repetition of the discussion of May 12, 1978. (Tr. 768-69).

referring to a statement said to have been made on July 31, testified that Ammirato gave a vivid account of petitioner's supposed criminal standing: "He told us that when we got ready to go to South America, that Dante had contacts in South America with certain groups that would arrange for protection for us when we arrived in the country." (Tr. 249). A tape recording of the same conversation, played in open court for the jury, contained Ammirato's statement that Colombia is controlled by five families and that "Dante's people know the five families." (Tr. 993-94).[6]

On cross-examination, both special agents stated that petitioner had never been satisfied that they were what they pretended to be. In Altman's terms, "the general statement was, 'We are still waiting for the vouch.'" (Tr. 383). O'Connor agreed that the agents had not been able to provide a satisfactory "vouch." (Tr. 1329).

After petitioner departed from the meeting on July 27, none of the government agents saw or spoke to him again before his arrest. O'Connor testified that he had been informed early in August that the "vouch" had not come through.[7] (Tr. 1363).

The prejudice to petitioner from these events is manifest. Because of Count I of the indictment, petitioner was put on trial with seven other defendants. That count alone bracketed him with the others. Although belatedly the Court of Appeals held that this great pile of

6. On the same day, talking to another of the agents, Ammirato belittled petitioner's supposed status in the criminal sphere by claiming that petitioner was merely one of Ammirato's agents. Peacock testified: "Mr. Ammirato stated that Mr. Grassi worked for him and was part of his group." (Tr. 849).

7. The source of this information was said to be Frank Ammirato. The only meeting in early August between O'Connor and Ammirato took place on August 2. (Tr. 850, 1355).

evidence did not touch petitioner, the overhang of that evidence clouds the validity of the jury verdicts against petitioner on Count II. It was the prosecution's theory that the two conspiracies charged in Counts I and II were linked by the overlapping membership in them of two defendants. The resulting joinder of defendants and joinder of counts resulted in the submergence of the meager evidence relevant to Count II in a sea of prejudicial material. Motions for severance made before trial, after the mini-hearing, and at the conclusion of the evidence were denied. (Record Excerpts 16a-24a; Tr. 80, 1417). The Court of Appeals reversed outright petitioner's conviction under Count I but allowed the conviction under Count II to stand.[8]

3. The Improper Theory of Conspiracy With Government Agents

The Court of Appeals has upheld the conviction on the erroneous theory that an agreement between a defendant and undercover government agents can consti-

8. On August 1, 1979, the District Court sentenced petitioner to consecutive prison terms of five years on Count I and ten years on Count II. (Record Excerpts 26a). After the sentencing proceedings in open court had been concluded, the trial court added an additional sentence of three years of special parole. Because of the improper procedure, the Court of Appeals set aside the special parole sentence and ordered the matter remanded to the District Court for further proceedings. (Appendix A, *infra*, p. A14). And see United States v. Middlebrooks, — F. 2d — (5th Cir., No. 79-5191, Aug. 14, 1980).

While not properly a matter for this Court at this time, the sentence on Count II is also improper. The maximum sentence for conspiracy to import marijuana, the offense upheld by the Court of Appeals, is provided by 21 U. S. C. § 841(b)(1)(B): for defendants with no prior narcotics convictions, the maximum term is five years. Petitioner has no prior narcotics convictions that would change this statutory ceiling.

tute a conspiracy and that an agreement subject to a condition that the sellers are not police—which they were —is still a valid agreement.

The entire evidence on Count II showed two inconclusive conversations. These discussions never went beyond a few generalities because the agents could not produce support for their assumed identities. The Court of Appeals held that the negotiations with the agents nonetheless resulted in a "final criminal agreement." The Court explained:

> "It is true that the importation was to occur only if Ammirato and Grassi became satisfied that they were not dealing with police, but such a proviso is like any condition in an agreement. That the agreement was subject to a condition does not make it any less an agreement." (Appendix A, infra, p. A9-A10).

The Court of Appeals plainly concluded that anyone who agreed to the proposition of the undercover agents would thereby commit the offense of conspiracy, a completely novel and wholly erroneous interpretation of the crime.

The Court of Appeals' extraordinary theory was not inadvertent. Examination of the whole record showed petitioner's behavior to have been markedly different from that of all other defendants, particularly that of Frank Ammirato, the only other defendant named in Count II. Ammirato was a leading figure in the consummated sales of drugs and weapons to the agents. Petitioner alone stood back and refused to have anything to do with these agents. The Court of Appeals, however, stated that the negotiations between petitioner and the agents was a final agreement, even though it was subject to a condition that the sellers-agents were not police which, of course, they were.

REASONS FOR ALLOWANCE OF THE WRIT

I. The standards and procedure for determining the admissibility of alleged coconspirators' statements under the Federal Rules of Evidence, as presented in this case by the conduct of a mini-hearing and the judicial rulings thereon, are important questions of federal law which have not been, but which should be decided promptly by this Court. The Courts of Appeals, after five years of litigation under the Federal Rules, are in conflict over the proper standards and procedures to be followed.

The Federal Rules of Evidence have clearly changed the basic groundrules for trial of conspiracy prosecutions, but those Rules have not made clear enough what the nature of those changes is. Rule 801, a section of definitions, declares that a statement of a coconspirator made during the course and in furtherance of a conspiracy is not hearsay vis-à-vis another member of the conspiracy. Rule 801(d)(2)(E). But that section does not indicate how the necessary facts are to be found, by whom they are to be found, and by what measure of proof. After five years of litigation a consensus of sorts has emerged among the Courts of Appeals that admission of alleged coconspirator's is now a decision for the court under Rule 104(a), but the lower federal courts are uncertain and vacillating as to the procedure to be followed and the standard of proof required for admission. Petitioner respectfully submits that these are vitally important matters of federal law that warrant the prompt consideration of this Court. The lower federal courts and, indeed, all courts need this Court's guidance.

Prior to the Federal Rules, a quite different practice generally prevailed. When a hearsay statement was proferred, the trial judge would immediately caution the

jury on the limited uses of hearsay and instruct them of the requirement that the conspiracy itself and each defendant's participation in it must be proved by independent non-hearsay evidence before the coconspirator's statement could be given weight by the jury. *Lutwak v. United States,* 344 U. S. 604 (1953); *United States v. Apollo,* 476 F. 2d 156 (5th Cir. 1973). In the closing instruction, using the standard of proof beyond a reasonable doubt, the court would charge the jury that they must decide, without the hearsay evidence, whether the conspiracy existed and whether the defendant and declarant were members of it. See E. DEVITT AND C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.06 (3d ed. 1977); *cf. United States v. Geaney,* 417 F. 2d 1116 (2d Cir. 1969); *Carbo v. United States,* 314 F. 2d 718 (9th Cir. 1963).

The Federal Rules of Evidence have altered this procedure to eliminate the jury from the crucial determination that the predicate exists for admission of an alleged coconspirator's statement. Interpreting Rule 104 (a), the Courts of Appeals have held that this is now a function for the trial judge. See, e.g., *United States v. Petrozziello,* 548 F. 2d 20 (1st Cir. 1977); *United States v. Stroupe,* 538 F. 2d 1063 (4th Cir. 1976); *United States v. James,* 590 F. 2d 575 (5th Cir.), *cert. denied,* 442 U. S. 917 (1979); *United States v. Enright,* 579 F. 2d 980 (6th Cir. 1978); *United States v. Santiago,* 582 F. 2d 1128 (7th Cir. 1978); *United States v. Andrews,* 585 F. 2d 961 (10th Cir. 1978); *United States v. Gantt,* 617 F. 2d 831 (D. C. Cir. 1980). See also J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[05] (1979); S. SALTZBURG AND K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 455-70 (1977).

In the present case, the district court elected to carry out Federal Rule of Evidence 104(a) by holding a mini-

hearing, outside the presence of the jury, to determine whether coconspirators' statements were admissible. With eight defendants, two conspiracy counts, and nineteen substantive counts, a lengthy and complex trial was in the offing. It is proper, indeed necessary, to use the new procedure of the Federal Rules of Evidence to allow early decision on the admissibility of alleged coconspirators' statements in such cases.[9].

The mini-hearing actually conducted, however, was grossly unacceptable. The mini-hearing was a quick, slap-dash, superficial affair. The issue posed is whether an inquiry that intentionally skims over the high spots [10] is acceptable under this Court's rules. Not only was there insufficient inquiry to make a responsible judicial determination, but the District Court applied a standard of proof that is irresponsibly low. The Court of Appeals conceded that the standard actually used was "not very rigorous," (Appendix A, *infra*, p. A7), but did not order any change in that practice.

The Court of Appeals was willing to tolerate the minimal standard of proof because there might be a second judicial ruling at the close of the trial. This, of course, overlooks the advantages obtained by the mini-hearing at the outset of trial. Moreover, once the trial judge has made a determination that the evidence is admissible in the mini-hearing, he is unlikely to reach a different con-

9. An additional gain to be made by a proper mini-hearing would be a better informed judicial decision, at the beginning of trial, on joinder of defendants or of offenses. If the district court had correctly perceived that there was no evidence to connect petitioner to Count I, a prompt severance would have ensued. This point is discussed further in the next segment of this petition.

10. The Court of Appeals, evaluating the evidence produced at the mini-hearing, found it completely wanting on Count I. The Court of Appeals opinion makes no reference to the results of that hearing on Count II.

clusion. Indeed, there is no indication in this record that the district court ever made the second ruling contemplated by the Court of Appeals.[11]

Utilization of mini-hearings in the implementation of Rule 104(a) could be a considerable advance in the quality of procedures for trying conspiracy cases. Such procedure ought to be given the imprimatur of this Court. In doing so, however, the shoddy procedure followed by the district court should be proscribed. Conspiracy prosecutions abound in the federal courts. These cases are not only frequent in occurrence, but they tend to be long and complex. Appellate review of convictions in these cases is difficult. The mini-hearing process, conducted properly on standards approved by this Court, would greatly improve the administration of justice. For an illustration of a well-conducted mini-hearing and effective appellate review, see *United States v. Perry*, — F. 2d — (5th Cir., No. 79-3904, Aug. 13, 1980).

II. When, as in this case, a defendant is tried in a multi-count conspiracy prosecution with many codefendants, and the overwhelming bulk of evidence is not relevant to nor admissible against the defendant, safeguarding the principle that "guilt is personal" presents important questions of federal law which have not been, but which should be decided by this Court.

This Court has repeatedly warned that it views with disfavor any broadening of the already pervasive and

11 The district judge had declared that he would handle this case in the same manner as he had been trying conspiracy cases for the past nine years. (Tr. 7). In his final instructions to the jury, he gave the form instruction used before the Federal Rules of Evidence when the ultimate decision on admission of coconspirators' statements was a matter for the jury. (Tr. 1452-53).

wide-sweeping nets of conspiracy prosecutions. E.g., *Grunewald v. United States*, 353 U. S. 391 (1957); *Krulewitch v. United States*, 336 U. S. 440 (1949); *Blumenthal v. United States*, 332 U. S. 539 (1947); *Kotteakos v. United States*, 328 U. S. 750 (1946).

This case was built from the results of a fishing expedition of three undercover agents who set out with the lures of thousands of dollars of ready cash and a *phony* story of a marijuana cargo to see what crimes they could find. A number of defendants succumbed to the lures. Although the evidence shows that petitioner tentatively considered the bait, he was never completely deceived by the agents' lies. As to him, this precursor of Abscam failed. In the district court, however, petitioner was convicted. He was lost in the welter of actions of other persons.

The fundamental reason is that petitioner was compelled to stand trial on two conspiracy counts with seven other defendants. The latitude allowed prosecutors in presenting evidence in conspiracy cases led to the introduction of a mass of evidence on Count I. Not until the Court of Appeals considered the case on appeal was it acknowledged that this mass of evidence did not incriminate petitioner. The overhang of that evidence, however, inexorably affected trial on the second conspiracy count. There were common parties charged in the two conspiracies, and the prosecution maintained that they were related enterprises.

In *Kotteakos v. United States, supra*, this Court held that conviction of a single conspiracy count could not be upheld where the evidence showed instead multiple conspiracies. This Court said:

> "The dangers for transference of guilt from one to another across the line separating conspiracies, sub-

consciously or otherwise, are so great that no one can really say prejudice to substantial right has not taken place." (328 U.S. at 774).

This case is the obverse of *Kotteakos*. Multiple conspiracies were charged. Notwithstanding petitioner's efforts before and during trial to obtain a severance, the charges were bound together in a single trial. It is impossible to say that there was no transference of guilt across the line separating the conspiracies.

This case is distinguishable from *Schaffer v. United States*, 362 U. S. 511 (1960). The trial court there allowed three substantive offenses to be tried together even though the conspiracy count which had originally provided the basis for joinder of those counts had been dismissed. This Court, in a 5-4 decision, concluded that defendants had not been prejudiced by the continued joinder of offenses. But in *Schaffer* the remaining counts were for substantive offenses, whereas here the harm of prejudicial spillover from one conspiracy to the other is inexorable. Moreover, the determination that the conspiracy count lacked evidentiary basis had been made in *Schaffer* before the case was submitted to the jury. Here, on the other hand, the trial court was oblivious to the fact that the mass of evidence presented on Count I did not incriminate petitioner. Not until the record was examined on appeal was petitioner finally upheld in his contention that he had no part in the numerous narcotics and weapons transactions germane to the Count I conspiracy.

The district court below conducted a mini-hearing on the first day of the trial to determine whether the prosecution had adequate evidence that the alleged conspiracies existed and that the defendants were participants in them. While that proceeding was primarily focused on the admission of hearsay evidence, it provided an opportunity,

unfortunately lost, to prevent the injury that occurred to petitioner. A motion for severance at the end of that hearing was denied. (Tr. 80).

Joinder of several conspiracies in a single trial raises special problems that this Court has not yet, but should now address.

III. (a) Whether an agreement between a defendant and undercover agents, that is subject to the condition that the agents are not police and (b) whether an agreement with undercover agents can support a conviction for conspiracy are important questions of federal law which have not been, but which ought to be decided by this Court. The Court of Appeals' decision affirming petitioner's conviction is in conflict with the decisions of other Courts of Appeals.

The conspiracy charged in the second count of this indictment has the unique quality stemming from a proposal by undercover government agents to sell a controlled substance. Case law is replete with illustrations of the reverse situation where undercover agents pose as persons willing to buy contraband or unlawful goods. Counsel is aware of no other case in which agents pretended to have something to sell.

The distinction is important because of the natural sequences of activities in these transactions. When the undercover agents act in the role of buyers, the defendants have the transactional burden of acting first. Sources of supply, logistics and a host of other matters must be solved by sellers, while buyers wait with their money for performance.

In the context of Count II the undercover agents assumed the role of importer-sellers. The goods were fictitious, non-existent. No steps were taken to plan or execute performance. All that occurred was two meet-

ings at which tentative discussions of future imaginary sales would take place if the sellers were not police.

Petitioner has consistently maintained that no agreement ever occurred or could occur because the undercover agents were unable to establish their false identities. But the court below held: "That the agreement was subject to a condition does not make it any less an agreement." (Exhibit A, p. A10). The case relied upon by the court below was *United States v. Thomas*, 567 F. 2d 5th Cir.), *cert. denied sub nom. Olivetti v. United States*, 493 U. S. 822 (1978). But there the evidence showed an extensive and detailed agreement among the defendants, putative sellers, to divide the multiple tasks involved in obtaining and delivering the narcotics. *Thomas* is merely a recent example of the familiar line of cases arising from the activities of undercover agents proposing to buy contraband materials.

In this case, by contrast, on Count II it was the undercover agents who had assumed the role of marijuana importers looking for buyers. There was evidence that petitioner and Ammirato showed interest in discussing the possibility, but discussions with the agents do not establish a criminal conspiracy. In the court below the government argued that the discussions with the agents had gone far enough to constitute a final agreement. The Court of Appeals rejected petitioner's argument that there could not have been an agreement because the agents had not been able to establish their assumed identities. Petitioner continues to assert that the negotiations of this preliminary agreement never resulted in a final agreement *with the undercover agents.*

After the second general discussion with the agents, petitioner—and petitioner alone—disappears from further events shown in the evidence. Ammirato and other defendants thereafter continued active dealing with the

undercover agents, stark evidence that petitioner had no criminal association with them. The Court of Appeals did not purport to find any agreement between petitioner and Ammirato on Count II. As indicated, the Court of Appeals conclusion rests on a supposed agreement with the agents. Without evidence sufficient to prove beyond a reasonable doubt that petitioner conspired with persons other than the agents, the conviction cannot stand.[12] *See* Jackson v. Virginia, 443 U. S. 307 (1979); Thompson v. City of Louisville, 362 U. S. 199 (1960).

Lower federal courts have held, as a matter of law, that an agreement between a person and an undercover agent cannot constitute a conspiracy. E.g., *Sears v. United States*, 343 F. 2d 139 (5th Cir. 1965); *United States v. Chase*, 372 F. 2d 453 (4th Cir. 1967). The question has not yet been decided by this Court.

This Court has held that an agreement between a husband and wife can form the basis for a conspiracy. *United States v. Dege*, 364 U. S. 51 (1960). It has long been held that a person can be guilty of conspiracy to commit an offense even though that person could not commit the substantive offense. *United States v. Rabinowich*, 238 U. S. 78 (1915). A woman's consent to her own interstate transportation for immoral purposes, however, does not render her criminally liable for conspiracy to violate the Mann Act. *Gebardi v. United States*, 287 U. S. 112 (1932).

The theory of the Court of Appeals below is without support in any decision of this Court. It conflicts with the judgment of other Courts of Appeals. If that decision is allowed to stand, it vastly expands the potential reach of conspiracy prosecutions.

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12. Any statements of Ammirato not made in the presence of petitioner cannot be used in the first instance to evidence any agreement between them, of course.

CONCLUSION

For the reasons advanced in this petition, it is respectfully submitted that a writ of certiorari should be issued to review the decision of the Court of Appeals below.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 79-5415.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANTE ANGELO GRASSI and
JACK LOUIS GAIL,
Defendants-Appellants.

May 14, 1980.

Appeals from the United States District Court for the Southern District of Florida.

Before MORGAN, ANDERSON and RANDALL, *Circuit Judges.*

LEWIS R. MORGAN, *Circuit Judge.*

Dante Angelo Grassi and Jack Louis Gail appeal from convictions based on their participation in a series of transactions involving controlled substances and unregistered guns. The principal issues presented by this appeal concern the sufficiency of the evidence to prove a conspiracy and the fairness of the joinder of the appellants together with six other defendants in a 21-count indictment.

The indictment charged both Grassi and Gail with conspiring to distribute controlled substances and to possess, transfer and transport unregistered firearms in violation of 18 U. S. C. § 371 (count 1). Grassi was also charged with conspiring to import controlled substances in violation of 21 U. S. C. § 963 (count 2). Gail was charged with shipping firearms in interstate commerce in violation of 18 U. S. C. § 924(b) (count 17). The appellants were convicted as charged.[1]

The evidence against the defendants consists primarily of the testimony of undercover agents and of tape recordings of the agents' conversations with the defendants during the period covered by the indictment. Having assumed the identity of smugglers of firearms and narcotics, agents Ralph Altman and Gary Peacock of the Bureau of Alcohol, Tobacco and Firearms first met with defendant Charles Watson on April 27, 1978 at Watson's place of business in Homestead, Florida. The agents explained that they had a substantial business exchanging guns for drugs with South American sources, and were exploring for new contacts who would help in the landing, off-loading and distribution of a great quantity of marijuana that would be received in the near future. The agents added that they would also be interested in obtaining weapons and pistol silencers for use in their narcotics trade. Watson asked to join in the marijuana venture, and offered to find silencers for two pistols the agents were carrying. Altman and Peacock agreed to accept Watson's help and delivered two .22 caliber pistol barrels to be fitted with silencers.

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1. Defendants Frank Ammirato, Carl Watson, Ken Lytle, Sturgall Russell and Charles Watson pleaded guilty in the early stages of the trial. Defendant Alfred Beuf, who requested a bench trial, was tried together with the appellants and was acquitted by the court.

Watson later introduced the agents to his brother, defendant Carl Watson, and defendant Frank Ammirato, who, Watson explained, could supply the agents with large quantities of automatic weapons, silencers and drugs. The agents met with the Watsons and Ammirato on May 5, 1978 at the construction site of the Ramblewood Middle School in Coral Springs, Florida. Carl Watson and Ammirato gave the agents a sample of pills from a supply of amphetamines they offered to sell. Four days later the agents met with Carl Watson again and purchased 1000 amphetamines for $850. At that meeting, the agents and Carl Watson discussed the details of the pending marijuana importation, Watson's progress in finding supplies of machine guns and pistol silencers, and the possibility that Watson and his associates would offer the agents a supply of quaalude pills.

Appellant Grassi was not introduced to the agents until May 12, 1978 during another meeting at the Ramblewood School. Grassi expressed interest in the agents' marijuana importation scheme, and proposed to work with the agents if they could supply reliable personal references. Peacock gave Grassi two names of people who would vouch for their operation, and Grassi proceeded to conduct a background check.

In the weeks that followed, Ammirato and Watson met regularly with Peacock and Altman to discuss the marijuana importation venture, and to negotiate and consummate various drug and firearms sales. Other defendants were introduced and participated in these deals, but neither Grassi nor Gail were present at any meetings during this stage of the investigations.[2]

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2. On May 22, Altman and Peacock met with the Watson brothers to discuss their agreement to buy qualude pills. The two pistol barrels that Charles Watson had received from the agents were returned because Watson's source for silencers was not interested in the job.

Gail was not introduced to the agents until early July 1978. At a meeting on July 6 between the agents, Ammirato and Watson, Ammirato informed the agents that he had a contact in Chicago who could supply the agents with silencers. The next evening, Ammirato, Peacock and Altman travelled to Chicago to meet Gail—Ammirato's Chicago contact. Gail sold the agents one silencer and offered to begin supplying fifty more per month. During the same meeting, Ammirato explained the various pending deals to Gail, and in Gail's presence told the agents that Gail would be interested in purchasing some of the quaaludes the agents were to receive from Ammirato. Gail added that he was also interested in buying cocaine.

Complications soon developed in Gail's plan to provide silencers to the agents. Gail reported that his source for silencers insisted on fitting the silencers on complete pistols so that the silencers could be tested as they were made and fitted. When the agents explained this problem to Ammirato, Ammirato said that he could procure and ship pistols to Chicago as needed.

On July 26, at a meeting at the Ramblewood School, Ammirato showed Peacock and Altman two pistols he had

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2. (Cont'd.)

At a meeting on May 23 between the agents, Ammirato and Carl Watson, Ammirato stated that he could provide pistols and silencers at $1000 apiece, and accepted a .22 caliber pistol barrel from the agents to try to have it silenced. Watson and Ammirato assured the agents that Grassi's background check was going well.

On May 30, Carl Watson sold a machine gun to the agents for $750. Subsequently, Watson and Ammirato sold another machine gun to the agents for $500 and promised to provide a large supply of silencers.

On July 10, Ammirato and Ken Lytle sold the agents 24 ounces of PCP for $20,700. On July 26, Ammirato introduced the agents to Sturgall Russell, who offered to sell 800 firearms for $250,000, and later delivered two .30 caliber rifles. On August 14, the agents purchased a .22 caliber pistol from Carl Watson.

purchased for them. Ammirato explained that he would have one of his men carry the guns to Chicago and deliver them to Gail to be fitted with silencers. Under the observation of agents of the Bureau of Alcohol, Tobacco and Firearms, defendant Alfred Beuf flew to Chicago that day, handed a briefcase to Gail at the airport, and left on a departing flight. Informed by Ammirato that the pistols were ready, Peacock and Altman flew to Chicago two days later and purchased the two silenced pistols from Gail.

Grassi reentered the scene on July 27 when the agents met with Ammirato and Grassi at Ammirato's home. The discussion at this meeting covered the planned marijuana importation as well as the many other completed and proposed illicit transactions. Ammirato told the agents that they would not receive any more pistols or silencers until the marijuana importation was accomplished. Grassi then proposed that if the agents could provide their own planes for the marijuana importation, he would send one of his men to protect them and arrange for a purchase of fifteen to thirty kilograms of cocaine along the way. The conversation then turned to the other illicit deals, and although Grassi listened, it does not appear that he contributed to this discussion or took part in any negotiation.

Further discussions and transactions between the agents and certain defendants followed.[3] The agents' last conversation with Gail before his arrest was at a meeting in Chicago on September 19. Gail stated that he was still interested in obtaining quaaludes, possibly in exchange for pistols and silencers, and asked when the

3. On July 27, the agents met with Watson and Ammirato to discuss various proposed firearm and drug deals.

On August 2, agent Altman placed $250,000 in a safe deposit box as payment for 800 firearms from Russell, but a dispute developed over the method of delivery and the transaction was aborted.

agents thought they would receive their quaaludes from Ammirato.

The eight defendants were arrested in late November of 1978 and joined in a 21-count indictment alleging two conspiracies and nineteen substantive offenses. Only Grassi and Gail resisted their convictions to the conclusion of the jury trial.[4]

I. Sufficiency of the Evidence

Following the selection of the jury but prior to the examination of the first witness before the jury, the district court held a hearing to determine the admissibility of certain extrajudicial declarations that the prosecution intended to introduce under the coconspirator rule. Such a hearing is mandated by *United States v. James*, 590 F. 2d 575 (5th Cir.), *cert. denied*, 442 U. S. 917, 99 S. Ct. 2836, 61 L. Ed. 2d 283 (1979). The purpose of the *James* hearing is to establish the existence, or nonexistence, of the predicates for the admission of a coconspirator's extrajudicial declaration *before* the declaration is made known to the jury. To be admissible, the extrajudicial statement must have been made (1) by one who conspired with the party against whom the statement is offered, (2) during the course of the conspiracy, and (3) in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Under *James* the responsibility for making these findings rests exclusively with the judge. 590 F. 2d at 579-80.

Evidence submitted at a *James* hearing for the purpose of proving a conspiracy must, of course, be free from hearsay objection; otherwise, a coconspirator's hearsay might bootstrap itself into admissible evidence. Moreover, in order to protect the defendant from the admission of prejudicial hearsay on the basis of threadbare evidence of conspiracy, the judge must decide at the

4. See note 1 *supra*.

conclusion of the *James* hearing whether the independent evidence linking the defendant to the conspiracy is substantial. 590 F. 2d at 580-81. If a conspirator's extrajudicial declaration is admitted into evidence, the judge must reconsider its admissibility at the conclusion of the trial. His second decision, however, is to be made by a higher standard: whether the prosecution, through independent evidence, has demonstrated the defendant's participation in a conspiracy by a preponderance of the evidence. If the prosecution has not prevailed on this point, the judge must decide whether a cautionary instructaion will cleanse the record of prejudice or whether a mistrial is required. 590 F. 2d at 582-83.

Appellants Grassi and Gail contend that the district court failed to apply the standards for proof of conspiracy enunciated in *James*, and that as a result, inadmissible hearsay was injected into the trial. The appellants further contend that the record as a whole is insufficient to sustain their conspiracy convictions.

At the outset of the *James* hearing the court urged the prosecution to move quickly and to present no more than the "threshold basis" for the invocation of the coconspirator rule. Had the prosecution attained the threshold as to every defendant and every conspiracy, we would have no quarrel with the district court's sustained efforts to expedite the proceedings. While the preliminary requirement of substantial evidence is not very rigorous, it demands at the very least that the court should determine that there is enough merit in the prosecution's case to risk the admission of hearsay that might later prove inadmissible when the court makes its second, more scrutinizing analysis of the evidence.

As to Grassi's link with the count 1 conspiracy, the *James* hearing record is nearly void. Agent Altman testified that on July 27 Grassi met with the undercover agents

and Ammirato at Ammirato's home, and that Grassi discussed his role in the planned importation of marijuana (count 2 conspiracy). The *James* hearing record shows no discussion of the count 1 conspiracy at this meeting except for Ammirato's introduction of defendant Beuf to the agents as "the kid who took the two pistols to Chicago for you." Nowhere does the record show that Grassi had joined the count 1 conspiracy, although it is clear that he was familiar with the conspirators and knew of their activities. The district court ruled that the prosecution had submitted substantial independent evidence against Grassi on count 1; consequently, government witnesses were allowed to testify that Ammirato had described Grassi as part of Ammirato's group.

If the evidence later produced at trial had supplied the needed link between Grassi and the count 1 conspiracy, we would hold that any error at the *James* hearing was not prejudicial. The trial record, however, adds very little as to Grassi's connection with the count 1 conspiracy. The agents again testified that Grassi was present at the July 27 meeting and that he discussed the terms of his involvement in the plan to import marijuana. It also appears that the others present at the meeting talked of other illicit transactions comprising the count 1 conspiracy, and that Grassi listened to these conversations.

Nevertheless, there is no evidence that Grassi was a participant in the count 1 conspiracy discussions, or that he indicated, expressly or impliedly, his involvement or personal interest in the count 1 conspiracy. Rather, the record shows that Grassi attended the July 27 meeting only to protect his interests in the marijuana importation scheme.

It is a cardinal rule of conspiracy law that one does not become a coconspirator simply by virtue of knowledge of a conspiracy and association with conspirators. *United*

States v. Falcone, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 2d 128 (1940); *United States v. Barrera*, 547 F. 2d 1250 (5th Cir. 1977); *United States v. Chandler*, 586 F. 2d 593 (5th Cir. 1978). The essence of conspiracy is the agreement to engage in concerted unlawful activity. To connect the defendant to a conspiracy, the prosecution must demonstrate that the defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective. *United States v. Avila-Dominguez*, 610 F. 2d 1266 (5th Cir. 1980).

Conspiracy law is not a dragnet for apprehending those with criminal dispositions. To prove that Grassi was aware of the illegal plan charged in count 2, and even approved of it, may impugn his character but does not place him in violation of the conspiracy laws. While evidence of knowledge and association may be combined with other circumstantial evidence to prove an agreement to join a conspiracy, *United States v. Etley*, 574 F. 2d 850 (5th Cir. 1978); *United States v. Evans*, 572 F. 2d 455 (5th Cir. 1978), we are unable to find any additional independent evidence against Grassi to support his count 1 conviction.

Since the independent evidence against Grassi is not substantial, we give no weight to the hearsay evidence that Grassi worked for Ammirato, and it follows that the prosecution's evidence against Grassi under count 1 was fatally deficient. *United States v. Malatesta*, 590 F. 2d 1379 (5th Cir. 1979).

As for Grassi's conviction under count 2, charging him with conspiracy to import marijuana, we find a sound basis in evidence. Grassi does not deny that he was a full participant in the planning of the marijuana importation, but he argues that discussions of the scheme were only preliminary to, and did not result in, a final criminal agreement. It is true that the importation was to occur only

if Ammirato and Grassi became satisfied that they were not not dealing with police, but such a proviso is like any condition in an agreement. That the agreement was subject to a condition does not make it any less an agreement.

At the time of his arrest, Grassi had agreed in principle to the undertaking, and together with Ammirato he had begun to negotiate the details of the plan and to discuss the necessary preparations. From this, the jury could find that Grassi had conspired to import marijuana. *United States v. Thomas*, 567 F. 2d 638 (5th Cir.), *cert. denied*, 439 U. S. 822, 99 S. Ct. 90, 58 L. Ed. 2d 114 (1978).

Like Grassi, appellant Gail contests the sufficiency of the evidence underlying his count 1 conspiracy conviction. As to Gail, however, there is no shortage of evidence of participation in at least some aspects of the wide-ranging criminal enterprise described in count 1. Gail's principal contention is that the many transactions proven during the trial were in reality separate conspiracies, most of which had nothing to do with Gail, and that the prosecution failed to establish the single, all-encompassing conspiracy alleged in the indictment.

This asserted variance between the indictment and the evidence is ground for reversal only if it affected a substantial right of the defendant. Proof of separate conspiracies after an indictment charging one conspiracy is not, per se, prejudicial. *Robinson v. United States*, 333 F. 2d 950 (5th Cir.), *cert. denied*, 379 U. S. 921, 85 S. Ct. 277, 13 L. Ed. 2d 335 1964). Gail contends that he was prejudicial before the jury by his joinder in a single trial with numerous unrelated defendants and criminal evidence based on an imaginary grand conspiracy. We therefore consider the question of variance of proof together with the question of whether joinder was permissible.

II JOINDER

The propriety of the joinder of two or more defendants in a single indictment is governed by Rule 8(b) of the Federal Rules of Criminal Procedure, which provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts of transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Whether joinder is sound under Rule 8(b) is to be determined from the face of the indictment. If the indictment's allegations, taken as true, establish a single conspiracy, there can be no inherent prejudice to the defendants. *United States v. Levine,* 546 F. 2d 658, 663 (5th Cir. 1977). Severance of the defendants is then a matter of trial court discretion under Rule 14 of the Federal Rules of Criminal Procedure. A trial court's denial of a motion for severance will not be reversed unless that discretion has been abused. *United States v. McLaurin,* 557 F. 2d 1064 (5th Cir. 1977), *cert. denied,* 434 U. S. 1020, 98 S. Ct. 743, 54 L. Ed. 2d 767 (1978).

The appellants' arguments against their joinder take two courses. First, they contend that the indictment and the evidence show that the count 1 conspiracy is in fact a multiplicity of conspiracies. Because we reverse the count 1 conviction against Grassi, this argument is now of importance only to Gail's appeal.

It is not crucial to the existence of a conspiracy that each conspirator participate in every phase of the criminal venture. *Blumenthal v. United States,* 332 U.S. 539, 68 S. Ct. 248, 92 L. Ed. 154 (1947). Nor is it necessary for

each conspirator to have knowledge of the identity and role of each of his coconspirators. *Id.* The unity essential to a conspiracy is derived from the assent of its members to contribute to a common enterprise. Seemingly independent transactions may be revealed as parts of a single conspiracy by their place in a pattern of regularized activity involving a significant continuity of membership. *United States v. Perez,* 489 F. 2d 51 (5th Cir. 1973), *cert. denied,* 417 U. S. 945, 94 S. Ct. 3067, 41 L. Ed. 2d 664 (1974).

The evidence, viewed in the light most favorable to the prosecution, *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1947), showed that the government agents had introduced themselves to the defendants as large-scale narcotics and firearms dealers in need of guns and willing to purchase additional quantities of drugs. Over several months, they established a regular business relationship with Ammirato and the Watsons, through whom appellant Gail and other defendants were introduced. Ammirato and the Watsons assisted Gail and the agents in the development of a new channel for guns and silencers. Gail in turn acquired an expectation that he would receive a share of the narcotics exchange between the agents and Ammirato. Each of the defendants involved in the count 1 conspiracy showed an interest in and awareness of the full range of activities encompassed in the count 1 conspiracy. Though Gail may not have known the identity of each defendant implicated in the illicit business, he was cognizant that there were others acting in unison to provide guns and drugs for the agents and he understood that his services were needed to satisfy Ammirato's new business associates. At the hub of this "wheel" conspiracy [5] was Ammirato, a common denom-

5. *See Kotteakos v. United States,* 328 U. S. 750, 755, 66 S. Ct. 1239, 1243, 90 L. Ed. 1557, 1561 (1946); *United States v. Levine,* 546 F. 2d 658 (5th Cir. 1977).

inator to nearly every phase of the conspiracy. Neither the indictment as drafted nor the evidence produced at trial negate the prosecution's theory of a single count 1 conspiracy.

The appellants' second argument against their joinder is that it was improper to combine separate conspiracies having different memberships. Rule 8(b) permits joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." On its face, the indictment makes allegations sufficient to meet this test. All named defendants were charged with the count 1 conspiracy. The addition of count 2, which did not charge Gail, rested on the theory, supported by the allegations, that the two conspiracies were part of the same series of acts or transactions. The count 1 conspiracy sprang from the count 2 conspiracy, and served partly to develop the organization needed to accomplish the count 2 conspiracy. Both conspiracies were alleged to have been formed during the same meetings by the same central participants, and were proved by much the same evidence. See *United States v. Gentile,* 495 F. 2d 626 (5th Cir. 1974). While our decision on this appeal that count 1 should have been dismissed as to Grassi attenuates the relationship between the defendants, it does not compel the conclusion that joinder was erroneous or prejudicial. Separate conspiracies with different memberships may still be joined if they are part of the same series of acts or transactions. *United States v. McDaniel,* 538 F. 2d 408 (D. C. Cir. 1976).

Since joinder was permissible under Rule 8(b), severance was in order only if undue prejudice was likely to result from a joint trial. Having considered the record carefully, we cannot say that the district court abused its discretion in denying the motion for severance.

III Entrapment

Gail also argues on appeal that the prosecution failed to rebut his defense of entrapment. Once the defendant submits some evidence that he was induced to commit the crime, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *United States v. Hammond,* 598 F. 2d 1008 (5th Cir. 1979).

The evidence showed that the agents were led to Gail by Ammirato, and that Gail sold the agents a weapon during their first meeting. Thereafter, Gail continued to do business with the agents with little encouragement and even proposed further illicit transactions. There is simply no merit to the contention that Gail was entrapped.

IV Grassi's Special Parole Term

When Grassi appeared before the court for sentencing, the district judge imposed prison terms of five years on count I and ten years on count 2, to be served consecutively. One day later, the district judge determined that federal law required the imposition of a three year special parole term in addition to Grassi's count 2 prison sentence. The special parole term was added to Grassi's sentence by a written order of the district court.

The punishment for Grassi's count 2 conviction is prescribed by 21 U. S. C. § 963, which provides the same range of sentences for conspiracy as would apply for the underlying offense. The punishment for the importation of marijuana, the object of the count 2 conspiracy, includes a mandatory three year special parole term. 21 U. S. C. § 960. This circuit has held that the special parole term "may" be imposed on offenders convicted under section 963. *United States v. Foundas,* 610 F. 2d 298 (5th Cir. 1980). We can see no reason why the special parole term

of section 963 should not be mandatory for conspirators if the section applies at all. We remand for resentencing, however, because the defendant was not present when his sentence was extended. See *Caille v. United States*, 487 F. 2d 614 (5th Cir. 1973).

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5415

D. C. Docket No. 78-6059-CR-JLK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANTE ANGELO GRASSI and JACK LOUIS GAIL,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before MORGAN, ANDERSON and RANDALL, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed as to Count II and reversed as to Count I as to appellant Grassi; the conviction of appellant Gail

is affirmed; and this cause be, and the same is hereby remanded as to appellant Grassi to the said District Court in accordance with the opinion of this Court.

May 14, 1980

Issued as Mandate: Aug. 8, 1980
(As to Dante Angelo Grassi Only)

APPENDIX C

Order

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

OFFICE OF THE CLERK

July 31, 1980

No. 79-5415

UNITED STATES OF AMERICA

v.

DANTE ANGELO GRASSI, ET AL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By WARREN A. GODFREY,
Deputy Clerk